IN THE

Supreme Court of the United States

October Term, 1958
No. 876

HELMS BAKERIES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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Respondent in his brief in opposition does not directly challenge the basic point of petitioner that Section 732(c) of Internal Revenue Code of 1939 does not foreclose review of a Tax Court decision involving Section 722 where the Tax Court's conclusions are contrary to its own findings, or are otherwise arbitrary and concededly violative of due process. What respondent essentially does is attempt to minimize the issue, as if to say that there may be areas, such as Section 722, in which a due process hearing is not of serious importance.

In none of the cases, however, cited by respondent as denying review where Section 722 was involved (Br. 7-9), was due process raised as an issue, or a showing of arbitrariness of decision made. Nor in any of the cases cited by respondent as generally supporting limitation of review

in relief cases (Br. 9-10), was a question of arbitrariness of decision in any way involved. On the contrary, the cases cited by respondent directly on that point (Br. 10), bring to bear a decision of this court in which petitioner's basic point is clearly stated, by way of limitation of the issue raised. That case is *Blair v. Oesterlein Machine Company*, 275 U. S. 220, where this court stated, at pages 226-227, in reference to "special assessment," the counterpart of Section 722 under the World War I tax provisions:

> "The determination is to be made upon prescribed and ascertainable data, and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We cannot assume that it is to be either *arbitrary* or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the board established to review his decisions." (Italics added.)

See also:

Silberschein v. United States, 266 U. S. 221, 225.

As petitioner stated in its petition (p. 5), it contended before the court below that the Tax Court's decision after remand was even more arbitrary than the one before. There is nothing in the second opinion of the court below, nor in respondent's brief in opposition, to contradict that contention. Nevertheless, we should like to point out to this court the more flagrant aspects of the Tax Court's second opinion. These are in addition to the breaches of due process described in the petition herein, or contained in the Tax Court's first opinion and relied on for reversal in the first opinion of the court below.

1. As it is obvious from a brief examination of Section 722, the Tax Court could easily nullify that section

by breaking it down into minute parts and then balancing each part separately against Section 713. Yet, as respondent's brief in opposition itself shows, that is exactly what the Tax Court did here.

As shown in that brief, at page 3, the Tax Court in its first opinion decided that no relief could be granted on the ground of Section 722(b)(2) "because whatever amount of relief could possibly be awarded would not in any event result in an excess profits credit greater than that already allowed by the Commissioner under the so-called 'growth formula' of section 713(f)." This result is completely untouched in the Tax Court's second opinion. In that opinion it deals only and strictly with relief under Section 722(b)(4) (which respondent, Br. 3, calls the "second issue"), and the Tax Court there concludes that the relief computed under that section would not reach the amount computed under Section 713(f) [R. 84-85].

That this balancing of Sections 722(b)(2) and 722(b)-(4) separately against 713(f) was clear error is shown in petitioner's petition (p. 3 and ftn. 5, p. 13). But it was more than error. It was arbitrary and capricious. It is wholly unsupported by reason.

A similar situation arose in *Packer Publishing Company v. Commissioner* (C. A. 8, 1954), 211 F. 2d 612, where Sections 722 and 711 were involved, both of which are covered by the prohibition of Section 732(c). The Tax Court had held there that it could not grant relief under both sections. The Eighth Circuit stated, however, at page 616:

> "Such a decision of the Tax Court is not within the purview of the prohibition of section 732(c).
>
> * * * * * * * *

"Granting that both sections are relief provisions and are to be strictly construed to the end that the relief intended should not be extended beyond the clear intent of the law as written, yet such construction should not be *unreasonable or arbitrary.*" (Italics added.)

2. The Tax Court states in its second opinion as one of the reasons for denying relief that "no shortage of baked goods existed in petitioner's sales area during the base period" [R. 84]. There is no finding anywhere to support this patently vague assertion. But worse still, as shown by the Tax Court's own evidentiary findings, it was precisely "petitioner's sales area," and therefore the number of its "routes," which was rapidly being expanded during the base period (Pet. App. pp. 11-12). It was for that reason that the court below in its first opinion required the Tax Court to make a finding, under the heading of capacity for operation, of the increase in level of earnings which would have resulted had the increase in capacity for operation, that is, the routes, taken place two years earlier (Pet. App. p. 12). But the Tax Court after remand failed and refused to make such a finding. In the face of this its blank assertion in its opinion after remand that there was no shortage of baked goods in "petitioner's sales area" becomes completely capricious.

3. The Tax Court further stated in its second opinion that:

"petitioner's cost of production was substantially increased by the additional capacities for operation and production during at least one full year while the development of additional routes attributable to such increased capacities took place." [R. 84].

In the first place, there is no finding that there was such an increase, or what the amount of such increase was. In the second place, such cost is itself an abnormal cost to be excluded in determining the constructive average base period net income. (E.P.C. 13, 1947-1 C.B. 83, 84). Thus the Tax Court asserts, as a basis for *denying* relief, a factor for which allowance is to be made in *granting* relief.

4. Still more arbitrary is the Tax Court's statement as a basis for denying relief that "a substantial price decline took place during the latter six months of 1939." [R. 85].

Of course, such a decline took place. That was the direct result of the price war which, as already observed, the Tax Court itself found was "a temporary economic circumstance unusual to the petitioner during its base period," and which that court, in its first report, assumed acted as a "depressant to its average base period net income." [R. 36, 54].

That price decline was thus the very circumstance for which petitioner sought relief under Section 722(b)(2). Yet not only does the Tax Court deny the relief under Section 722(b)(2) but asserts the very circumstance involved as a normal one, instead of the temporary and the unusual one which its own findings show it to be, in order to defeat relief under Section 722(b)(4). Instead of combining, as it should, the relief under Section 722(b)(2) with that under Section 722(b)(4), the Tax Court treats the one as a sort of negative wiping out the other.

5. Even the Tax Court's comparison with Section 713(f) is, on its very face, arbitrary. That court assumes in its comparison that the average base period net income determined under Section 713(f), the "ABPNI," is throughout $226,274.89. [R. 84]. As to 1944, however,

the ABPNI is only $205,206.91 [R. 83], so that as to that year the determination under Section 722 must be balanced against a figure of $205,206.91 instead of $226,247.89. Yet the Tax Court makes its comparison only with the higher figure for all years.

6. Clearly, moreover, if the Tax Court found that it was "unable to conclude" that petitioner's earnings would have reached a higher level than $226,247.89, it must have determined some figure which they would have reached. The Tax Court, however, has failed to make any statement as to what figure it did determine under Section 722.

The distortions pointed out above in the Tax Court's second opinion are, as we have pointed out, in addition to those in its first opinion which the court below found and pointed out in its own first opinion. They show a studied effort not to make a determination at all but simply to deny relief. This is no case of simple error or minor inconsistencies. This is a case in which throughout the record the Tax Court casts reason to the winds and seeks only to deny relief.

We submit that upon the record the court below had *jurisdiction* to review the decision of the Tax Court so arbitrarily reached in violation of constitutional requirements. To say otherwise would be to reverse the identification of due process with reason throughout the long history of this Court.

Respectfully submitted,

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